

No. 13,703

IN THE

United States Court of Appeals  
For the Ninth Circuit

*Here only*

ERNEST B. LOPEZ,

*Appellant,*

vs.

EDWIN B. SWOPE, Warden, United  
States Penitentiary, Alcatraz, Cali-  
fornia,

*Appellee.*

BRIEF FOR APPELLEE.

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FILED

MAR 17 1953

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**BRIEF FOR APPELLEE.**

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**JURISDICTIONAL STATEMENT.**

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for writ of habeas Corpus. (Tr. 6.) The appellant asserts that the Court below had jurisdiction to entertain the petition under the provisions of Title 28 U.S.C.A., Sections 2241-2250 and 2255. Jurisdiction to review the order of the Court below denying the application is conferred upon this Honorable Court by Title 28 U.S.C.A., Section 2253.

**FACTS OF THE CASE.**

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, sought by petition for writ of habeas corpus to secure his release from the custody of the appellee, the warden of the said institution. (Tr. 1-5.) In his petition, appellant alleged that with good time credits earned he had served more than thirteen years of sentences totalling seventeen years, seven years first imposed against him by the United States District Court for the Southern District of California on July 30, 1943—five years for receiving stolen government property, and two years for conspiracy—and thereafter ten years imposed against him by the United States District Court for the Western District of Washington for violations of the Federal Escape Act.<sup>1</sup> Petitioner further alleged that these thirteen years were all that he could be legally compelled to serve since the trial Court for the Southern District of California could only impose a valid sentence of one year for the theft violation. Thereupon, after consideration of the cause, the Court below denied the application on the ground that it was without jurisdiction to entertain the same. (Tr. 6.) Thereafter, the appellant filed a motion for a new trial (Tr. 7-9) which the Court below likewise denied on the same ground on which it had denied the petition, and on the additional ground that the said petition failed to state a claim upon which relief could be granted. (Tr. 10.) From

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<sup>1</sup>Appellant did not state in his petition the date sentence was imposed against him in the Western District of Washington.

the order denying the petition for writ of habeas corpus, the appellant now appeals to this Honorable Court. (Tr. 11.)

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### QUESTION.

Did the appellant state a cause of action cognizable in habeas corpus?

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### CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

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### ARGUMENT.

In its original order denying appellant's application for writ of habeas corpus, the Court found that it was without jurisdiction to entertain the same since appellant's remedy, if any, was not by habeas corpus but by motion to vacate sentence under the provisions of Title 28 U.S.C.A., Section 2255, citing the decision of this Honorable Court in *Sorrentino v. Swope*, 198 Fed. (2d) 789. Cf. *Lopez v. United States*, (C.A. 9) 186 Fed. (2d) 707. Assuming arguendo that the Court below had jurisdiction to entertain the petition, it could properly have been denied as it was by the Court below in its order denying appellant's motion for a new trial herein on the ground that the said petition failed to state a claim upon which relief could be granted. The basis of appellant's complaint

is that he was improperly tried and sentenced in the United States District Court for the Southern District of California for receiving stolen government property under Title 18 U.S.C.A., formerly Section 101, which provided for a maximum sentence of five years, when, in fact, he should have been tried and sentenced under certain Sections of the Second War Powers Act of 1942, which carried a maximum sentence of one year. It should be noted in this connection that the stolen government property consisted of certain gasoline ration books prepared and printed for issuance by the Office of Price Administration, an agency of the United States of America. This contention of appellant is so patently without merit that appellee believes that it can be disposed of in the language of the Court below when it said, among other things, that appellant's petition fails to state a claim upon which relief can be granted.

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#### CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,  
April 17, 1953.

CHAUNCEY TRAMUTOLO,  
United States Attorney,

JOSEPH KARESH,  
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*Attorneys for Appellee.*